

**CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA**

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November 22, 2010

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *In the Matter of Petition for Declaratory Ruling Regarding Zevo-3*, MB Docket No. 10-190

Dear Ms. Dortch:

The U.S. Chamber of Commerce¹ opposes the Campaign for a Commercial-Free Childhood's ("CCFC") Petition for Declaratory Ruling ("Petition") regarding the *Zevo-3* program on the Nicktoons network.² The Chamber urges the Commission to reject the CCFC Petition because it: 1) ignores Congressional intent and fails to justify overturning carefully-balanced Commission precedent that encourages the marketplace to create and broadcast high-quality children's programming; 2) fails to show that *Zevo-3* violates the Children's Television Act and the Commission's children's programming rules; and 3) fails to distinguish *Zevo-3* from other similar matters considered by the Commission.

I. Summary of the CCFC Petition

"*Zevo-3*," a television program created by Skechers Entertainment that airs on the Nicktoons network,³ features characters originally developed by the shoe manufacturer Skechers

¹ The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. Chamber policy states: Government regulation over broadcasting should be kept to the minimum and exercised only to the degree clearly required by the public interest. Broadcasting should be accorded the guarantees traditionally inherent in a free press. Therefore, there should be no governmental control over program content or scheduling, either direct or indirect.

² Campaign for a Commercial-Free Childhood, *Petition for Declaratory Ruling that the Broadcast of Skechers' Zevo-3 Violates the Public Interest*, MB Dkt. 10-190 (filed Sept. 13, 2010) ("Petition").

³ <http://www.ncta.com/OrganizationType/CableNetwork/1649.aspx>. ("Nicktoons offers 24 hours of animated programming...[and]reaches 54 million homes via cable, digital cable and satellite...Nicktoons is part of the MTV Networks expanded suite of channels available for digital distribution.")

USA to promote the sale of its shoes to children. In its Petition, CCFC argues that because *Zevo-3* is based on commercial spokescharacters, the entire program should be deemed “commercial matter” that constitutes a “program length commercial” that violates the Children’s Television Act of 1990 (“CTA”) and certain of the Commission’s rules and policies limiting the amount and kind of advertising in children’s television programs.

II. The CCFC Petition Ignores Congressional Intent and Fails to Justify Overturning Carefully-Balanced Commission Precedent that Encourages the Marketplace to Create and Broadcast High-Quality Children’s Programming

Today’s video programming marketplace is flourishing. Consumers can choose among hundreds of channels and can receive their service from cable, DBS, and new entrants (i.e., local phone companies). Additionally, many consumers now use the Internet to view video programming.

Fostered by the CTA, there has also been a corresponding increase in children’s programming available on traditional broadcast channels and on more than a dozen cable channels.⁴ Children of all ages benefit from these shows, which offer age-appropriate content designed to educate, inform, and entertain. The development of these shows fulfills the Congressional intent behind the CTA, which was to create a television marketplace that “assist[s] children to learn important information, skills, values, and behavior, while entertaining them and exciting their curiosity to learn about the world around them.”⁵ Congress also realized that “the financial support of advertisers assists in the provision of programming to children.”⁶

Zevo-3 “features strong and positive characters who deal with issues that children confront on a regular basis, such as peer pressure, bullying and family relationships,” according to MTV Networks.⁷ Thus, the CCFC Petition, which seeks to bar the broadcast of *Zevo-3* merely because the show’s characters originated as spokescharacters for a commercial product, should be denied because it is inconsistent with Congressional intent.

In developing its children’s programming rules, the Commission has struck a balance that the CCFC Petition ignores.⁸ Recognizing the importance of “preserv[ing] the creative freedom

⁴ Comments of MTV Networks at 3, MB Dkt. 10-190 (filed Oct. 22, 2010) (“MTV Networks Comments”).

⁵ 47 U.S.C. § 303a note at (1); *see* MTV Networks Comments at 3.

⁶ 47 U.S.C. § 303a note at (3); *see* MTV Networks Comments at 3.

⁷ MTV Networks Comments at 11.

⁸ *See generally* Comments of Association of National Advertisers, Inc., the American Advertising Federation, and the American Association of Advertising Agencies, MB Dkt. No. 10-190 (filed Oct. 22, 2010) (“ANA Comments”).

and practical revenue sources that make children's programming possible,"⁹ the Commission has found that when evaluating whether programs violate the Commission's children's programming rules "the fact that programming may serve commercial goals...in and of itself, is not controlling."¹⁰ As the Commission has also said, "Eliminating the economic base and incentive for children's programs would inevitably result in some curtailment of broadcasters' efforts in this area....[and] it seems unrealistic, on the one hand, to expect licensees to improve significantly their program service to children and, on the other hand, to withdraw a major source of funding for this task."¹¹

Chairman Genachowski recently said that the Commission's "primary focus is simple: "the economy and jobs," and is concerned with the question of "what can [the Commission] be doing to drive private investment that will grow our economy and create quality jobs?"¹² One answer is to ensure that the agency's rules continue to encourage the investment of human and financial capital necessary for the development, production, and broadcast of high-quality children's programming. Therefore, the Commission should reject the CCFC Petition because it would create regulatory uncertainty and jeopardize a business model that not only benefits children, but also generates jobs and related economic benefits.

III. Zevo-3 is in Compliance with the CTA and the Commission's Children's Programming Regulations

Section 102 of the CTA and Section 76.225 of the Commission's rules limit the amount of commercial matter which may be aired in certain children's television programming to 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays.¹³ Commercial matter is defined as "air time sold for purposes of selling a product or service."¹⁴

⁹ *Policies and Rules Concerning Children's Television Programming*, 6 FCC Rcd 2111, 2117 (1991) ("CTA R&O"), *recon. granted in part*, 6 FCC Rcd 5093 (1991) ("CTA MO&O"); see MTV Networks Comments at 2 and ANA Comments at 3.

¹⁰ *In re Complaint of Action for Children's Television against Television Stations KTTV, Los Angeles, California; et al.*, Memorandum Opinion and Order, 58 R.R.2d 61 (1985) ¶ 17 ("KTTV"); see MTV Networks Comments at 15.

¹¹ *In the Matter Petition of Action For Children's Television (ACT) for Rulemaking Looking Toward the Elimination of Sponsorship and Commercial Content in Children's Programming and the Establishment of a Weekly 14-Hour Quota of Children's Television Program*, Children's Television Report and Policy Statement, 50 FCC 2d 1, ¶ 35 (1974) ("Policy Statement"); see ANA Comments at 3-4.

¹² Prepared Remarks, Chairman Julius Genachowski, *Our Innovation Infrastructure: Opportunities and Challenges*, NARUC Annual Meeting at 1 (Nov. 15, 2010), available at http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db1115/DOC-302802A1.pdf.

¹³ 47 U.S.C. § 303a(b); 47 C.F.R. § 76.225.

¹⁴ CTA R&O at 2112.

The Commission's children's programming rules bar the airing of a "program-length commercial," which is defined as "a program associated with a product in which commercials for that product are aired."¹⁵ Through this policy, the Commission seeks to "protect[] children from the confusion and deception the intermixture of related program and commercial material may inflict upon them, and still preserve[] the creative freedom and practical revenue sources that make children's programming possible."¹⁶

The Commission's host-selling policy "prohibits the use of program talent or other identifiable program characteristics to deliver commercials." The goal of this policy is to address the concern that a character appearing in a children's program who is then shown selling a product during that same program will unfairly take "advantage of the difficulty children have distinguishing advertising from programming"¹⁷ by abusing the "trust which children place in program characters."¹⁸ The host-selling ban is part of a more general rule requiring separation, through special measures such as "bumpers," between content and commercial messages during children's programming.¹⁹

According to MTV Networks: 1) Nicktoons will not include any commercials for Skechers products during the airing of any *Zevo-3* episode; 2) the characters featured in *Zevo-3* will not sell any product or promote any service during a *Zevo-3* episode or in any commercial aired during the episode; 3) there will be no mention of the Skechers logo or brand name during an episode of *Zevo-3*; 4) the shoes are never the focus of the plot; 5) the character's superpowers do not come from their shoes; and 6) Skechers Entertainment and MTV Networks have created compelling plotlines and characters that will delve into topics, such as peer pressure, bullying and family relationships, that are of key concern to children today.²⁰

The Petition does not assert that "stand-alone, spot" advertising²¹ during *Zevo-3* will exceed the 10.5-minute or 12-minute time limits for children's programming. Rather, the Petition argues that the show in its entirety should be considered a program-length commercial because the characters in *Zevo-3* originated as promotional characters for Skechers shoes. However, in its Reply Comments, CCFC acknowledges that *Zevo-3* "does not violate the FCC's definition of a program length commercial."²² Therefore, the Commission should reject the

¹⁵ *Id.* at 2117.

¹⁶ *Id.*; see MTV Networks Comments at 7.

¹⁷ *Policy Statement* at ¶ 51.

¹⁸ *Id.* at ¶ 52.

¹⁹ *CTA R&O* at 2118.

²⁰ MTV Networks Comments at 8-11.

²¹ *Id.* at 6.

²² Reply Comments of CCFC at 10, n.38.

Petition because *Zevo-3* is not a commercial-length program associated with a product in which commercials for that product are aired.

The mere appearance of Skechers' spokescharacters on *Zevo-3* does not violate the Commission's rule requiring separation between content and commercial messages during children's programming. In shows ranging from "The Transformers" to the "Smurfs," there are numerous examples of characters that have "appeared in both a children's television program and a separate commercial advertisement or product."²³ It is settled Commission precedent that there is "no useful purpose in restricting unnecessarily presentation of programs merely because products are depicted therein."²⁴

Thus, when deeming whether a particular program is compliant with the separation rule and with children's programming rules, in general, the Commission should only consider content that airs during an episode or within a commercial during that episode. *Zevo-3* episodes and any commercials aired during the episodes will: 1) not contain any references to Skechers or its logo; and 2) not use *Zevo-3* characters to sell any product or promote any service. Therefore, the Commission should reject the Petition because *Zevo-3* does not violate either the Commission's separation rule or its host-selling rule.

IV. The CCFC Petition Fails to Distinguish *Zevo-3* from Other Similar Matters Considered by the Commission

The CCFC's Petition asserts arguments that have been previously rejected by the Commission and fails to provide any evidence that would enable the agency to distinguish this matter from the Commission's prior decisions.

In *Action for Children's Television ("ACT") v. KTTV*, the Commission addressed complaints regarding numerous children's shows, featuring pre-existing characters based on products or used to market products, including: "He Man and the Masters of the Universe," "G. I. Joe: A Real American Hero," and "Strawberry Shortcake and Care Bears Family TV Fun Festival."²⁵ ACT argued that these programs were "nothing more than long commercial messages in a 'program-like' format...[that] exploits children by blurring already difficult distinctions between program and commercial material in direct conflict with a broadcaster's 'public trustee' responsibilities."²⁶ ACT contended that the "active participation by the respective toy manufacturers in the production of these programs, particularly the injection of

²³ MTV Networks Comments at 9.

²⁴ *KTTV* at ¶ 18; *see* MTV Networks Comments at ii.

²⁵ *Id.* at ¶ 2, n2.

²⁶ *Id.* at ¶ 2.

editorial control over program content,”²⁷ meant that the entire program should be considered a commercial.

The Commission rejected ACT’s arguments and held that “when a broadcaster has in place adequate safeguards against the direct intermixture of commercial and program segments, and that broadcaster reaches a good faith decision that a particular program will entertain or inform a child audience, the fact that commercial entities may also benefit is irrelevant.”²⁸ In its *ACT v. KTTV* decision, the Commission further added that it “can see no useful purpose in restricting unnecessarily presentation of programs merely because products are depicted therein.”²⁹

Additionally, in its *CTA R&O*, the Commission rejected ACT’s request to establish a rebuttable presumption that anything “less than a two-year time span between the introduction of a television program and a related product or vice versa,” would be prima facie evidence that the show is a program-length commercial.³⁰ The Commission argued that implementation of such a rule would “jeopardize highly acclaimed children’s shows...that have products associated with them.”³¹ The Commission further feared that this type of restriction “would stifle creativity by restricting the sources that writers could draw upon for characters, would limit revenues from merchandising which are an important source of production funding, and would ignore the educational role toys or other related products can play in child development.”³²

Thus, regardless of the origins of the characters featured in the program or that Skechers might obtain an “advertising boost”³³ from its spokescharacters receiving airtime, it is clear that the broadcasting of *Zevo-3* does not violate the CTA or the Commission’s children’s programming rules if Nicktoons reaches a good faith decision that the program will entertain or inform a child audience, does not advertise the product within the show, does not include commercials for Skechers products during the show, and does not engage in host-selling. Therefore, the Chamber urges the Commission to reject the CCFC Petition because it fails to distinguish *Zevo-3* from other shows considered in past Commission decisions and merely rehashes old arguments that have been previously rejected by the Commission.

²⁷ *Id.*; see MTV Networks Comments at 14.

²⁸ *Id.* at ¶ 18; see MTV Networks Comments at 15-16 and ANA Comments at 8.

²⁹ *Id.*

³⁰ *CTA R&O* at 2117.

³¹ *Id.*; see MTV Networks Comments at 16 and ANA Comments at 8.

³² *Id.*

³³ *Petition* at 12.

Ms. Marlene H. Dortch
November 22, 2010
Page 7 of 7

V. Conclusion

The Chamber urges the Commission to reject the CCFC Petition because it would jeopardize the creative freedom and financial support necessary to develop the type of high-quality programming envisioned by the Congress when it passed the Children's Television Act.

Sincerely,

A handwritten signature in black ink, appearing to read "William L. Kovacs", written in a cursive style.

William L. Kovacs